APPENDIX A

AVCO CORP. V. PRECISION AIR PARTS, INC., NO. 79-275-N (M.D. ALA. SEPT. 4, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 79-275-N
[Filed Sept. 4, 1980]

AVCO CORPORATION,

Plaintiff,

vs.

PRECISION AIR PARTS, INC.,

Defendant.

MEMORANDUM OPINION

Before the Court is Defendant's motion to dismiss or, in the alternative, motion for summary judgment filed herein January 21, 1980. In its complaint filed herein June 12, 1979, Plaintiff alleged State causes of action for misappropriation of trade secrets, unfair competition and common law copyright infringement. Defendant contends that Plaintiff's State causes of action are preempted by the Copyright Revision Act of 1976, 17 U.S.C. § 301. Upon consideration of the aforesaid motion, the affidavits, the answers to interrogatories and the briefs filed herein, this Court is of the opinion that, in this case of first impression, the Defendant's motion for summary judgment should be granted.

FACTS

A review of the record, when construed in the light most favorable to Plaintiff, reveals the following material facts:

1. Plaintiff and Defendant are competitors in the manufacture and sale of replacement parts for gasoline airplane engines.

2. Manufacturers of replacement parts for aircraft engines, other than the original FAA certified manufacturer, must obtain a Parts Manufacturer Approval (PMA) from the FAA before it may sell replacement parts. 14 C.F.R., § 21.303. Defendant obtained several PMAs from the FAA for replacement parts for which Plaintiff is the FAA certified manufacturer. Since one method of obtaining a PMA is for an applicant to show that the design of the part is identical to the design of a part that is covered under a type certificate, Plaintiff alleges that Defendant has, "on information and belief, without proper authority obtained and improperly utilized copies of Lycoming proprietary drawings and specifications to obtain PMAs for replacement parts for Lycoming engines" (Complaint, ¶ 11). This constitutes the basis for Plaintiff's claim for misappropriation of trade secrets.

3. Plaintiff has also alleged that "[s]uch unlawful appropriation or misappropriation of the valuable trade secrets and confidential information of Lycoming constitutes unfair competition" (Complaint, ¶ 12).

4. The claim of common law copyright infringement is premised upon Plaintiff's allegation that, "on information and belief", the Defendant has "copied or duplicated, or caused additional copies or duplications to be made from, such original Lycoming drawings and specifications", which Defendant has used to obtain PMAs from the FAA (Complaint, ¶ 20).

5. None of the engines utilizing the parts which are the subject matter of this action have been patented or made the subject of a patent application which is pending or has been withdrawn (Plaintiff's Answer to Interrogatory No. 4).

6. Plaintiff has not applied for registration of a claim to copyright on any of the parts designs or trade secrets which are the subject matter of this suit (Plaintiff's Answer to Interrogatory No. 18).

CONCLUSIONS OF LAW

Defendant contends that the causes of action alleged in Plaintiff's complaint are preempted by the Copyright Revision Act of 1976, 17 U.S.C. § 301(a).[1] This Court agrees.

For a cause of action to be preempted by the federal statute, the facts must relate to rights that are equivalent to the exclusive rights belonging to a copyright holder as specified in 17 U.S.C. § 106,[2] the works of authorship must be fixed in a tangible medium of expression and the facts must concern a work which

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[1] "(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

[2] "§ 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS. Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

is within the subject matter of copyright as specified by §§ 102[3] and 103[4].

The essence of Plaintiff's complaint is that Defendant has copied its drawings and specifications and prepared derivative works based upon those drawings and specifications. Thus, the complaint fits squarely into § 106(1) and (2). It is undisputed that the drawings and specifications are "fixed in a tangible medium of expression". Finally, the drawings and specifications in issue could certainly be characterized as pictorial or graphic works. Thus, this Court is of the opinion that the requirements of 17 U.S.C. § 301(a) are satisfied by the facts in this case.

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[3] "§ 102. SUBJECT MATTER OF COPYRIGHT: IN GENERAL. (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.

"(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Patent rights supplement where copyrights terminate. 35 U.S.C. §§ 1, *et seq.*

[4] "§ 103. SUBJECT MATTER OF COPYRIGHT: COMPILATIONS AND DERIVATIVE WORKS. (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

"(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such works, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."

The Congressional intent behind the Copyright Revision Act was to "preempt and abolish any rights or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law" (Notes of Committee on the Judiciary, House Report No. 94-147). Thus, not only are common law copyright infringement actions preempted, but those actions "equivalent to copyright" are also preempted.

Count II of Plaintiff's complaint is "directed to Precision's infringement of Avco's common law copyright rights, is subsidiary and incident to Count I, and was brought in good faith to preserve Avco's rights" (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss or, In the Alternative, For Summary Judgment, p. 2). As a common law copyright infringement claim, it is specifically preempted by the Copyright Revision Act of 1976; however, if the cause of action arose before the effective date of the Copyright Revision Act (January 1, 1978), then it would not be affected by the preemption provisions. 17 U.S.C. § 301(b)(2). However, under Alabama law, the applicable statute of limitations for common law copyright infringement actions is one year [CODE OF ALABAMA, § 6-2-39(a)(5)]. *Local Trademarks* v. *Rogers*, 73 F.Supp. 907 (N.D. Ala.), affm'd. *Local Trademarks* v. *Price*, 170 F.2d 715 (5th Cir. 1948). Since Plaintiff's complaint was not filed until June 6, 1979, the limitations period would bar the common law copyright infringement action if it arose before January 1, 1978. Thus, this Court is of the opinion that Plaintiff's common law copyright infringement claim does not state a cause of action upon which relief can be granted and is due to be dismissed.

Even though Plaintiff's causes of actions alleged in Count I of its complaint are based on the same set of facts as the common law copyright infringement claim in Count II, Plaintiff contends that they are not equivalent to copyright and, thus, not preempted by 17 U.S.C. § 301. This Court disagrees.

In Count I of its complaint, the Plaintiff has alleged State causes of action for misappropriation of trade secrets and unfair competition. Plaintiff relies heavily on the contention that, while Alabama does not have any statutes concerning misappropriation of trade secrets, it has adopted the view as expressed by the RESTATEMENT OR TORTS, §§ 757[5] and 759[6]. *McDonald's Corp.* v. *Moore*, 243 F.Supp. 255 (S.D. Ala. 1965), affm'd. 363 F.2d 435. However, that case was decided prior to the enactment of the Copyright Revision Act of 1976. Furthermore, §§ 757 and 759 were omitted from the SECOND RESTATEMENT OF TORTS (1979).[7] Since McDonald's was decided prior to the enactment of the Copyright Revision Act of 1976 and it is the only case cited or divulged through the Court's independent research in support of Plaintiff's contention that Alabama has adopted the RESTATEMENT's view on misappropriation of trade secrets, this Court is not convinced that Alabama does, in fact, recognize such a cause of action. However, if Alabama has adopted the RESTATEMENT view, jurisdiction is preempted — as in conflict with federal law — where it is based on a right

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[5] "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake."

[6] "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."

[7] It was explained in said treatise that these sections, along with other sections relating to unfair trade practices, were omitted because "these subjects have become substantial specialties in their own right, governed extensively by legislation and largely divorced from their initial grounding in the principles of tort" (p. VII).

within the scope of copyright or on a right equivalent thereto[8] or does not require the elements of an invasion of privacy, a trespass, a breach of trust or a breach of confidentiality.[9] This Court has already determined that Plaintiff's rights allegedly violated by Defendant — copying Plaintiff's drawings and specifications and preparing derivative works therefrom — are within the scope of copyright. 17 U.S.C. § 106(1) and (2). Plaintiff has not even alleged, much less shown that Defendant has committed any of the elements that allow the common law rights of "trade secrets" to avoid preemption. Thus, this Court is of the opinion that Plaintiff's cause of action for "misappropriation of trade secrets" is preempted by the Copyright Revision Act of 1976.

Plaintiff, however, contends that its cause for misappropriation of trade secrets is not affected by the statute in issue because it arose prior to January 1, 1978. 17 U.S.C. § 301(b)(2). However, this Court is of the opinion that this action neither arises from a contract nor is it specifically enumerated under any other statute of limitations. Thus, the one-year statute of limitations (CODE OF ALABAMA, § 6-2-39(a)(5) [1975]) would toll on Plaintiff's cause of action arising before January 1, 1978, by Janaury 1, 1979. Thus, Plaintiff's complaint filed herein June 12, 1979, would not be timely filed unless, as Plaintiff insists, misappropriation of trade secrets is a "continuing tort" which is

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[8] " 'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled 'misappropriation' is not preempted if it is fact based neither on aright within the general scope of copyright as specified by section 106 [section 106 of this title] nor on a right equivalent thereto." Notes of Committee on the Judiciary, House Report No. 94-1476.

[9] The common law rights of "trade secrets" are not preempted by the Copyright Revision Act of 1976 so long as the cause of action contains elements, "such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement." Notes of Committee on the Judiciary, supra.

not barred until one year after the last wrongful act. See, *Garrett* v. *Raytheon Co.*, 368 So.2d 516 (Ala. Sup.Ct. 1979).[10] This Court is of the opinion that, if the cause of action arose at the time of an alleged misappropriation occurring before January 1, 1978, the cause would be barred by the limitations period and if the misappropriation occurred on or after January 1, 1978, Congress preempted the field by providing a federal exclusive remedy.

Plaintiff's allegation that the alleged misappropriation of trade secrets constitutes "unfair competition" is without merit. "Unfair competiton generally consists of 'palming off' on customers, who are buying with ordinary care, the goods or business of one person as and for the goods or business of another." *Jefferson Home Furniture Co.* v. *Jefferson Furniture Co.*, 349 So.2d, 5, 8 (Ala.Sup. Ct. 1977). Plaintiff does not allege, nor has it shown, that Defendant has falsely labeled, fraudulently represented or otherwise "palmed off" its product on Plaintiff's customers.

While a State may require that precautionary steps be taken to prevent customers from being misled as to the source of products, i.e., "palming off", it cannot prevent the copying of unpatented and uncopyrighted articles, since to do so would conflict with the federal patent and copyright laws.

> "To forbid copying would interfere with the federal policy, found in Art. I, § 8, I. 8, of the constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave

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[10] There is considerable federal authority indicating "that the injury to a plaintiff's interest occurs, and the statute begins to run, either at the time of misappropriation or when disclosure of the trade secret is made. See, *Monolith Portland Midwest Co.* v. *Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 (9th Cir. 1969); * * * *Shatterproof Glass Corp.* v. *Guardian Glass Co.*, 322 F.Supp. 854 (E.D. Mich. 1970), aff'd. 462 F.2d 1115 (6th Cir. 1972), cert.denied 409 U.S. 1039." *M & T Chemicals, Inc.* v. *International Bus. Mach. Corp.*, 403 F.Supp. 1145, 1148 (S.D. N.Y. 1975).

in the public domain. * * * But if the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will." *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234, 237 (1964).

Thus, this Court is of the opinion that Plaintiff's unfair competition is preempted and is due to be dismissed.

For the reasons heretofore, discussed, this Court is of the opinion that Plaintiff's complaint fails to state a cause of action upon which relief can be granted and should be dismissed.

An Order will be entered in accordance with this Opinion.

DONE this 4th day of September, 1980.

/s/ R. E. VARNER
UNITED STATES DISTRICT
JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 79-275-N

[FILED SEPT. 4, 1980]

AVCO CORPORATION,

Plaintiff.

VS.

PRECISION AIR PARTS, INC.,

Defendant.

ORDER

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the Plaintiff's complaint, failing to state a cause of action upon which relief can be granted, be, and the same is hereby, dismissed, and the above-styled cause is hereby dismissed with costs taxed against the Plaintiff, for which execution may be granted.

DONE this 4th day of September, 1980

/s/ R. E. VARNER
UNITED STATES DISTRICT
JUDGE

APPENDIX B

AVCO CORP. V. PRECISION AIR PARTS, INC., 676 F.2d 494 (11TH CIR. 1982)

Before RONEY and FAY, Circuit Judges, and EDENFIELD*, District Judge.

RONEY, Circuit Judge:

Plaintiff Avco Corporation and defendant Precision Air Parts, Inc. are competitors in the manufacture and sale of replacement parts for gasoline airplane engines. A manufacturer of replacement parts for aircraft engines, other than the original manufacturer certified by the Federal Aviation Administration ("FAA"), must obtain a Parts Manufacturer Approval ("PMA") from the FAA before it may sell replacement parts. 14 C.F.R. § 21.303 (1980). Precision obtained several PMAs from the FAA for replacement parts for which Avco is the FAA certified manufacturer.

In this diversity jurisdiction suit, Avco charged Precision with trade secret misappropriation and common law copyright infringement in connection with these replacement parts. We affirm the district court's judgment for defendant on the ground that both counts are barred by the Alabama one-year statute of limitations.

Dismissal or Summary Judgment?

Interestingly, on appeal the parties dispute whether the district court entered a summary judgment or dismissed the complaint for failure to state a cause of action. This turns on the district court's intent in the matter, and we would have thought that the able counsel here should have gotten the matter resolved in the district court. Appropriate procedures are available in the district court and there is no explanation as to why this should be an issue before us.

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* The Honorable Newell Edenfield, U.S. District Judge for the Northern District of Georgia, sitting by designation. This case is being decided by a quorum due to the death of Judge Edenfield on December 26, 1981. 28 U.S.C. § 46(d).

The confusion arises because the last sentence of the opening paragraph of the memorandum opinion states that "this court is of the opinion that ... the Defendant's motion for summary judgment should be granted." The final sentence of the order states that "this court is of the opinion that Plaintiff's complaint fails to state a cause of action upon which relief can be granted and should be dismissed." The district court in a subsequent order dated December 3, 1980 referred to the order in question as having been a grant of summary judgment in Precision's favor.

This is not a case in which the district court has *sua sponte* converted a Rule 12(b)(6) motion into a summary judgment motion, considered matters outside the pleadings, and granted the motion without giving proper notice to the adverse party. *See, e.g., Davis* v. *Howard*, 561 F.2d 565 (5th Cir. 1977); *Davis* v. *Zahradnick*, 600 F.2d 458 (4th Cir. 1979). The motion in question was clearly styled "Motion by Defendant Precision to Dismiss Avco's Complaint, or in the Alternative, to Grant Summary Judgment in Favor of Defendant Precision and Against Plaintiff Avco." *See McMillian* v. *City of Rockmart*, 653 F.2d 907 (5th Cir. 1981).

Avco had ample time and opportunity to present any material relevant to the summary judgment motion but failed to do so. While a statute of limitations defense may be raised on a motion to dismiss for failure to state a claim for which relief can be granted under Fed.R.Civ.P. 12(b)(6), *see Mann* v. *Adams Realty Co.*, 556 F.2d 288 (5th Cir. 1977), when the complaint shows on its face that the limitations period has run, *Mooney* v. *Tallant*, 397 F.Supp. 680 (N.D.Ga.1975), the defect may be raised by motion for summary judgment where the alleged failure to comply with the statute of limitations does not appear on the face of the complaint. *Chambliss* v. *Coca-Cola Bottling Corp.*, 274 F.Supp. 401, 408 n.14 (E.D. Tenn. 1967), *aff'd*, 414 F.2d 256 (6th Cir. 1969), *cert. denied*, 397 U.S. 916, 90 S.Ct.

921, 25 L.Ed.2d 97 (1970). *See also Higgenbotham* v. *Ochsner Foundation Hospital*, 607 F.2d 653 (5th Cir. 1979).

In this case the complaint does not set forth any date on which Avco's causes of action allegedly accrued. The district court, therefore, necessarily went beyond the pleadings in making a determination on the statute of limitations question. Consequently, the district court's decision must be construed as one granting summary judgment. Therefore, this Court will apply the standard of review for a summary judgment motion in its consideration of the merits of the appeal. *See, e.g., Marcus* v. *St. Paul Fire & Marine Insurance Co.*, 651 F.2d 379, 382 (5th Cir. 1981) (summary judgment may be granted only if there is no issue as to any material fact and the law favors the moving party).

Statute of Limitations

The district court correctly held the one-year statute of limitations applicable to both common law copyright infringement and trade secret misappropriation because neither arises from contract nor is specifically enumerated under any other Alabama limitations statute. *Ala.Code* § 6-2-39(a)(1975).[1] *See also Local Trademarks, Inc.* v. *Rogers*, 73 F.Supp. 907, 908 (N.D.Ala.1947), *aff'd, Local Trademarks* v. Price, 170 F.2d 715 (5th Cir. 1948).

The central difficulty in applying the limitations statute stems from the argument over when the cause of action accrued and the limitations period started to run.

The district court made no definitive determination due to the way it handled the case. The court held that claims arising prior

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[1] Ala.Code § 6-2-39(a)(5) states as follows:

(a) The following must be commenced within one year:

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . .

to January 1, 1978 were time-barred and that claims thereafter were preempted by the federal Copyright Revision Act, 17 U.S.C.A. § 301(b)(2), which became effective on that date. Since the complaint was filed on June 12, 1979, this left open the question of whether the limitations statute barred claims between January and June of 1979, regardless of preemption. Critical to this determination is whether misappropriation of trade secrets is a "continuing tort" under Alabama law, which would mean the cause of action is not barred until one year after the last wrongful act. Although the district court and the plaintiff-appellant here considered the preemption issue paramount, we agree with the defendants that Alabama law would not recognize the continuing tort theory as applied to these causes of action and that a review of the record before the district court reveals that plaintiff's alleged causes of action are time-barred, thus making it unnecessary for us to consider the correctness of the court's decision that they were preempted by the federal law after January 1, 1978.

All the district court had before it was the complaint, the respective interrogatories, and answers from each side and several affidavits. This is all this Court can consider on appeal. Although Avco has attempted to supplement the record on appeal with the partial deposition of Mr. McCune, Precision's president, taken prior to Precision's motion, Avco did not submit it to the district court for consideration and this Court cannot now consider that testimony.

Under Alabama law a cause of action accrues for statute of limitations purposes "as soon as the party in whose favor it arises is entitled to maintain an action thereon." *Garrett* v. *Raytheon Co.*, 368 So.2d 516, 519 (Ala.1979). The district court apparently felt that Avco's causes of action "arose at the time of an alleged misappropriation." The complaint is silent as to when Precision performed the acts which gave rise to this action. The complaint does not differentiate between any separate acts of

Precision with respect to particular replacement parts but combines in one cause of action all of Avco's information that Precision allegedly misappropriated. One must look elsewhere in the record to determine when Avco's cause of action accrued.

Avco's answer to Precision's Interrogatory No. 2 provides some information:

INTERROGATORY NO. 2

> State all dates and surrounding circumstances in detail as to any alleged misconduct on the part of defendant constituting the basis of your claims.

ANSWER

> The dates, to the extent now known, were the dates on which defendant Precision Air Parts, Inc., submitted wrongfully obtained Lycoming data to the FAA to obtain PMA's for replacement parts for Lycoming engines. Other dates are unknown at this time pending the completion of Lycoming's discovery herein. Defendant's use of Lycoming's confidential, proprietary, and trade secret information constitutes a continuing tort, however, and such misconduct is therefore continuing.

Precision's answer to Avco's Interrogatory 7-c indicates Precision applied for five PMAs on April 17, 1978, one on September 28, 1978, and one on December 11, 1978. Precision argues that Avco's cause of action accrued either at the time of misappropriation or when the first disclosure of trade secrets was made, by the first PMA application. Since the complaint was filed on June 12, 1979, any cause of action arising from the PMA applications of April 17, 1978 would be clearly time-barred. Only if misappropriation of trade secrets is a continuing tort, not barred until one year after the last wrongful act, would the September and December applications come into play so that Avco could prevail on this issue.

There is no Alabama case directly on point, and there is a conflict in other jurisdictions as to when a cause of action for trade secret misappropriation accrues. *Compare Monolith Portland Midwest Co.* v. *Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 (9th Cir. 1969) *with Underwater Storage, Inc.* v. *United States Rubber Co.*, 371 F.2d 950 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 859, 17 L.Ed.2d 784 (1967), *on remand* 314 F.Supp. 546 (D.D.C. 1970). Therefore, other analogous areas of Alabama law must be reviewed to decide what an Alabama court would hold if faced with this question. *See Arceneaux* v. *Texaco, Inc.*, 623 F.2d 924 (5th Cir. 1980), *cert. denied*, 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 359 (1981).

As Avco points out in its brief, Alabama courts have recognized continuing torts in certain circumstances. *See Minyard* v. *Woodward Iron Co.*, 81 F.Supp. 414 (N.D. Ala.), *aff'd*, 170 F.2d 508 (5th Cir. 1948); *American Mutual Liability Insurance Co.* v. *Agricola Furnace Co.*, 236 Ala. 535, 183 So. 677 (1938); *Howell* v. *City of Dothan*, 234 Ala. 158, 174 So. 624 (1937). *See also Commercial Union Assurance Co.* v. *Zurich American Insurance Co.*, 471 F.Supp. 1011, 1015 (S.D. Ala. 1979). These cases generally hold that, for purposes of applying the appropriate statute of limitations in a case involving a continuing disease or injury, the date of injury is the last day on which the plaintiff was exposed to the dangerous conditions. *See, e.g., Minyard* v. *Woodward Iron Co.*, 81 F.Supp. at 417.

Alabama law also provides, however, that a cause of action accrues "as soon as the party in whose favor it arises is entitled to maintain an action thereon," *Garrett* v. *Raytheon Co.*, 368 So.2d at 519, and the statute of limitations begins to run "whether or not the full amount of damages is apparent at the time of the first legal injury." *Id.* Furthermore, it has been held that:

> If the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the

> cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage [then apparent] however slight, and the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not actionable at the time of the wrong done; for in such a case *the subsequent increase in the damages resulting gives no new cause of action.*

Id. (emphasis added). *See also Moore* v. *United States Pipe & Foundry Co.*, 384 So.2d 1108 (Ala. Civ. App. 1980) (cause of action accrues as soon as plaintiff is entitled to maintain an action regardless of whether the full amount of damages is apparent at the time of the first legal injury).

This statement of the law fully coincides with Precision's view of the case, *i.e.*, Avco's injury, if any, arose at the latest on April 17, 1978 when Precision applied for PMAs on five Lycoming parts, and that is the date the statute began to run.

Avco tries to circumvent Precision's argument in two ways. First, Avco argues that even if the statute did run on some of its claims, its causes of action with respect to the uses Precision allegedly made of Avco's trade secrets and drawings within one year of the filing of its claim are unaffected by the statute of limitations. This argument is founded on the premise that each use of Avco's materials by Precision gave rise to a new cause of action and that the statute of limitations began to run anew with each allegedly wrongful use. In actuality, however, such later use of the materials by Precision only increased Avco's damages.

Avco's second argument involves the continuing tort theory which is really just a variation of its first contention. Avco argues that misappropriation of a trade secret is a continuing tort so long as the value of the secret is not destroyed by general disclosure. There is some support for Avco's contention. *See Underwater Storage, Inc.* v. *United States Rubber Co.*, 371 F.2d 950 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 859, 17 L.Ed.2d 784 (1967), *on remand* 314 F.Supp. 546

(D.D.C.1970); *Anaconda Co.* v. *Metric Tool & Die Co.*, 485 F.Supp. 410, 426 (E.D.Pa. 1980). Nevertheless, this Court finds, in light of the general explanation of Alabama law quoted above from *Garrett*, Alabama would rule that the actionable injury occurs, if at all, either at the time of misappropriation or when disclosure of the trade secret is made. *See Monolith Portland Midwest Co.* v. *Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288 (9th Cir. 1969). *See also M & T Chemicals, Inc.* v. *International Business Machines Corp.*, 403 F.Supp. 1145 (S.D.N.Y.1975), *aff'd*, 542 F.2d 1165 (2d Cir. 1976), *cert. dismissed*, 429 U.S. 1030, 97 S.Ct. 656, 50 L.Ed.2d 637 (1976); *Freedman* v. *Beneficial Corp.*, 406 F.Supp. 917, 922 (D.Del.1975); *Shatterproof Glass Corp.* v. *Guardian Glass Co.*, 322 F.Supp. 854 (E.D.Mich.1970), *aff'd*, 462 F.2d 1115 (6th Cir. 1972), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 518, 34 L.Ed.2d 487 (1972); *Kearns* v. *Ford Motor Co.*, 203 U.S.P.Q.884 (E.D.Mich.1978).

Avco's assertion regarding general disclosure is based in part on a misreading of *Monolith*. Avco states in its brief that *Monolith* "stands only for the proposition that adverse disclosure will commence the limitations period." This is simply wrong. *Monolith* clearly held that the cause of action for misappropriation of trade secrets "fully matured at the moment [defendant] first made *adverse use or disclosure* of the trade secret in violation of its confidential relationship." 407 F.2d at 292 (emphasis added).

Avco attempts to avoid the consequences of this rule by asserting that it suffered no legal injury from the alleged misappropriation until Precision used the trade secrets by selling parts. Avco claims Precision's application to the FAA alone did not constitute legal damage because the disclosure did not diminish the value of Avco's trade secrets. This claim is without merit. Precision's applications for PMAs, if wrongful, clearly constituted adverse use of Avco's property.

Conclusion

Given the Court's reading of how Alabama courts would interpret the law as it applies to this case, the Court finds that there is no question of material fact as to whether the statute of limitations began to run on Avco's claim on April 17, 1978 and expired on April 17, 1979. Because Avco's complaint was not filed until June 12, 1979, there is no question of material fact that this action was time-barred. This determination, as noted above, "preempts the preemption question" on appeal. Therefore, the Court expresses no opinion as to that issue.

The Court affirms the district court's grant of summary judgment in favor of defendant Precision Air Parts because both counts of plaintiff's complaint are barred by the Alabama statute of limitations.

AFFIRMED.

* * *

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 216), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY [filed June 28, 1982]
United States Circuit Judge